No. 83-738

IN THE

Supreme Court of the United States

October Term, 1983

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE,

Appellant,

vs.

UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OPPOSING MOTIONS TO AFFIRM

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TABLE OF CONTENTS.

TABLE OF AUTHORITIES.[1]

[1] This brief does not contain references to materials required to be listed in a Table of Authorities under Rule 33.5(b).

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Preliminary Statement

The New York State Department of Public Service seeks review of a United States District Court decision approving AT&T's plan for reorganizing the Bell System. The basis of our appeal is that the plan of reorganization, as approved, violates the Court's "modification of final judgment" (MFJ) by allowing AT&T to retain customer premises equipment while

transferring the cost of installing, testing and handling that equipment to the newly divested Bell Operating Companies. Although the MFJ requires AT&T to accept all books of account relating to customer premises equipment (J.A. 174), Judge Greene has allowed AT&T to avoid its responsibility to assume "station handling costs." His decision is grounded on a fundamental mistake of fact; that is, AT&T's incorrect contention that it is impossible to develop a reasonable estimate of these costs.

By motion dated November 22, 1983, AT&T has sought an expeditious affirmation of Judge Greene's decision on the grounds that this appeal "implicates the heart of the reorganization" (page 8) and that New York's objection to the BOCs' retention of station handling costs is frivolous.

I. AT&T's motion for summary treatment of this appeal should be denied.

As indicated in New York's Jurisdictional Statement, the station handling costs associated with the customer premises equipment which AT&T will retain after reorganization are at least $106 million and arguably as high as $600 million in New York State alone (New York Jurisdictional Statement, pg. 7). AT&T has managed to avoid its responsibility under the MFJ to assume these costs by misrepresenting the facts. That is, although New York Telephone Company and Pacific Telephone Company have both presented a *minimum* quantification of station handling costs within Account 232, AT&T informed Judge Greene that station handling costs could not be quantified and therefore could not be transferred to AT&T. It is therefore understandable that AT&T would now seek to minimize judicial review of this enormously important issue.

In support of its contention that Judge Greene's decision should be summarily affirmed, AT&T claims that the station handling issue "implicates the heart of reorganization". However, in attempting to support its contention, AT&T has discussed only the significance of complex wire and debt allocations—questions raised by the California Commission.

The pendency of this appeal appears to have had no effect on the trading of the common stock of AT&T and the newly divested regional holding companies. And there clearly is no basis for even an argument that careful review of the station handling issue would in any way jeopardize the mechanics of reorganization.

AT&T's contention that a correction of Judge Greene's error on this issue could lead it "to reconsider these and other provisions of the MFJ and plan, because any significant change in the plan could destroy the careful balance the MFJ was intended to achieve" is at best disingenuous. As AT&T's own statement of the case acknowledges, its plan of reorganization has already undergone 41 amendments. If it now reflects a "careful balancing" of shareholder/customer interests, what did it represent when AT&T first submitted it?

There is no question that the station handling issue now before this Court involves well over a billion dollars in costs and far-reaching policy issues. AT&T's motion for summary affirmance should be denied.

II. AT&T's description of the station handling issue is simply incorrect.

Station handling costs are the capitalized labor expenditures related to the handling, installation and testing of customer premises equipment prior to January 1, 1981. There is no question that these costs, by definition, relate to customer premises equipment under the terms of the decree (MFJ, Section I (A)(2); J.A. 174). Indeed, Judge Greene recognized this fact when he acknowledged the "theoretical case" for assigning these costs to AT&T (J.A. 344). The only questions on appeal, therefore, are (1) whether AT&T misled Judge Greene into believing that "there is no practical way to separate out the various handling costs" (*Id.*), and (2) whether the court's utter failure to assign *any* station handling costs to AT&T was an abuse of discretion in light of the clear language of the MFJ requiring the transfer of CPE-related costs to AT&T.

AT&T has attempted to blur these questions by offering a series of claims which, frankly, misrepresent the facts. Perhaps the most useful method of replying to AT&T's arguments is to answer them *seriatim* as they appear at pages 16 through 21 of its brief.

First, AT&T claims that New York has acknowledged that the BOCs were properly assigned complex and simple inside wiring (AT&T, page 16). AT&T offers no citation to New York's Jurisdictional Statement because, indeed, New York made no such statement. In fact, we objected vehemently to this assignment before Judge Greene but decided to limit our appeal to the station handling issue.

Second, AT&T characterizes New York's description of station handling costs as the costs incurred for service

men to "perform the function of connecting the inside wire to telephone handsets." Again, AT&T offers no reference to our jurisdictional statement because it has misrepresented New York's position. Station handling costs do not relate to the connection of inside wire to telephone handsets but, rather, to the handling and testing of customer premises' equipment before it is even installed, as well as its installation.

Third, AT&T claims that station handling is simply "the last act in establishing a *working station connection*" (Emphasis added, AT&T, p. 17). Its statement could not be further from the truth. Indeed, customers in the past with existing phones which they wished to replace or those adding additional station sets (extensions), clearly had "working station connections", but imposed additional station handling costs on their BOCs when they ordered new CPE. Station handling costs relate to the customer premises equipment which AT&T will receive from its BOCs—not to the provision of local exchange service.

The company's fourth argument repeats its erroneous contention to Judge Greene that there is no way to determine station handling costs and that, therefore, it should be assigned none of these costs (AT&T, p. 17). As indicated in New York's Jurisdictional Statement, AT&T's contention belies the action of its own subsidiaries—New York Telephone and Pacific Telephone.

In our Jurisdictional Statement, New York pointed out that "station handling costs can be identified with as much certainty as a myriad of other assets and costs being transferred in the divestiture proceeding" (New York, p. 6). AT&T challenges this statement by arguing that all other assets are being transferred in accordance with precise recordkeeping (AT&T, p. 18, footnote 12).

The plan of reorganization's allocation of depreciation reserves, income reserves and off-book items all entail a prorating of transferred assets to total book accounts.

AT&T's next claim is that station handling investment is not a physical asset and therefore its assignment is irrelevant to AT&T's prices and post-divestiture competition (AT&T, pages 18-19). This position defies common sense. If AT&T is assigned station handling costs (which, again, its competitors clearly incur), it must either increase its prices or decrease its profits.

AT&T argues that requiring it to assume the station handling costs related to the CPE which it will receive would "renege on the regulatory obligation to permit the Bell System's three million shareholders to recover their capital" (page 21). AT&T is conveniently ignoring the fact that Bell System shareholders own the Bell operating companies as well as AT&T. The Court's correction of Judge Greene's error would simply require AT&T's shareholders to shoulder the costs of handling and testing AT&T's equipment.

Finally, AT&T implies that the capitalization of station handling costs (to further Congress's goal of universal service) was inconsistent with accepted accounting principles (AT&T, page 20). By no stretch of the imagination can it be said that capitalizing costs relating to the handling of capital assets (CPE) is in any way improper.

AT&T's position boils down to the claim that newly divested Bell operating companies should be forced to assume costs relating to AT&T's equipment because AT&T was unable to estimate these costs. Judge Greene's acceptance of this claim was, again, based on a fundamental mistake of fact and otherwise an abuse of discretion.

Conclusion

Based on the foregoing, the Court should note probable jurisdiction of this appeal. It should deny AT&T's motion for summary affirmance and permit full briefing and argument of the "station handling costs" issue.

Respectfully submitted,

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